

ZONING BOARD OF APPEALS
MEETING MINUTES

April 13, 2010

4:00 P.M.

CALL TO ORDER: Mr. John Stetler, called meeting to order at 4:00 p.m.

ATTENDANCE:

Members Present: Deland Davis, Greg Dunn, Mike Fatt, James Moreno, John Stetler, and Carlyle Sims and Becky Squires

Staff Present: Jill Steele, Asst. City Attorney; Susan Bedsole, Director Community Services; Christine Hilton, Planning Supervisor; Glenn Perian, Senior Planner; and Leona Parrish, Planning Admin. Assistant.

ADDITIONS OR DELETIONS TO THE AGENDA: None

Mr. John Stetler, Chairperson stated the meeting procedure and that everyone present may speak either for or against an appeal. He stated he will ask for a staff report to be read and then open the public hearing. At the public hearing persons may come forward and state their name and address for the record as it is being recorded and then speak either for or against an appeal. The public hearing will then be closed and the zoning board will discuss and make a decision. Mr. John Stetler stated if denied they may appeal to the Circuit Court.

OLD BUSINESS:

Appeal #Z-02-10: (68 E. Emmett Street)

Mr. John Stetler stated for the record this was an appeal that was tabled from the January 12, 2010 Zoning Board meeting. Petition submitted by Steffel & Steffel Attorneys & Counsellors at Law on behalf of owners Mr. Richard Green & Marion Pinkerton, 68 E. Emmett St., Battle Creek, MI, requesting a use variance to allow an "R-1C Single Family Residential" zoned property to be used as an "R-2 Family Residential" for property located at 68 E. Emmett Street, Parcel #3170-00-058-0. The rental permit application was denied because of Planning and Zoning Code, Chapter 1246.02.

Mr. Perian read an update from the staff report and findings: Appeal #Z-2-10 is a petition from Marion Pinkerton and Richard Green seeking a use variance to allow for a two-family dwelling in an "R1C Single Family Residential" zone at 68 E. Emmett Street. Stated the subject lot is a residential lot approximately 75' wide by 110' deep with a land area of 8,250 sq. feet. The subject property is located on E. Emmett Street, just south of the hospital with residential uses located to the immediate west, east and south.

Mr. Perian noted staff is recommending denial of appeal #Z-2-10 based on the following findings:

- 1) Staff does not believe that the petitioner has clearly demonstrated that an unnecessary hardship does, in fact, exist.
- 2) Staff does not think the unnecessary hardship is exceptional and peculiar to the subject property. The property is located in an R-1C zone and could be used for any use permitted in the R-1C district.
- 3) Staff does not believe the alleged hardship which will result in a failure to grant the variance is substantially more than a mere inconvenience in this case.

- 4) Staff does not think that by allowing the variance, substantial justice will result, considering the public benefits intended to be secured by the Zoning Code.

Based on these findings and those articulated in the staff report, we are recommending denial of this appeal.

Mr. Kent Bieberich of Steffel & Steffel Attny Ofc. was present to speak on behalf of property owners Mr. Richard Green & Marion Pinkerton, stated the cities records show multiple units in 1946 it was built as a 2-unit, has 2 meters for the past five years. He admits there was a rental approval done for a single-unit but see no hardship as it is a grandfathered use. Noted the owners have put thousands of dollars into this property and is not a new change, but have always been 2-units.

Mr. Richard Green came forward stating they bought this property because it had 2-units which would help with taxes etc. and they have put a lot of money into this property. Stated the city did not say anything when permits were pulled regarding it not being allowed for 2-units.

Mr. Greg Dunn reflected from the January ZBA meeting minutes that a person was renting upstairs to help as a caretaker for Ms. Pinkerton and if that was correct? Mr. Green stated yes, that in the future her niece is willing to stay but cannot because of being a non-rental.

Mr. Dunn referenced the letter submitted to the city from Mr. Bieberich stating the burden of proof was the city's to prove it is not a 2-unit and if Mr. Green could elaborate. Mr. Bieberich stated the city has the burden of proof that a legal nonconforming use has been abandoned; stated he thinks the law is on their side, that his client would not have bought this property if they knew it was not a 2-unit. Mr. Bieberich admits persons could call the city to ask what a property's allowable use is, but other records show in 1947 it was allowed to be a 2-unit and in recent 2-years it was rented (registered) as a single unit.

Mr. Dunn asked for confirmation that construction records showed in 1947 it was allowed to be a 2-unit and in recent two-years it was registered and rented as a single-unit. Mr. Bieberich stated it was allowed to be a single-family, but its use has been a 2-unit and the real-estate office showed it in their agreement records.

Senior Planner, Mr. Perian stated the rental registration application submitted by the previous property owner lists only one unit. Additionally, the real estate listing document (Attachment Sec. C submitted by the petitioner as part of their variance application) states: Housing Type as "single family" and Income Property as "No".

Mr. Nelson Karre, Vandervoort, Christ & Fisher, P.C., representing Ms. Lanie Ganey of 58 E. Emmett St. neighbor of petitioner; stated he just learned of the possibility of the legal -nonconformity use just today. Mr. Karre reminded the board of Mr. Jenkins variance that had been denied, and noting there was nothing before them to show it had been a use as a 2-family use; which it might not have been used as such. Stated even the building permit does not prove it had been used as a 2-unit. Mr. Karre urged the board to ignore and that the applicant has not met the burden of proof to show a non-conforming use; he asked that the zoning board deny this variance request.

Mrs. Laurie Sullivan, 130 Frelinghuysen Ave., stated she had the opportunity to meet in October with the contractor who was conforming this property into a 2-unit and the decision that the board makes stays with the property. Stated the zoning pre-exempts what its use is and what the real-estate sells as.

Mr. David Nielsen, 44 Latta Street, NPC #4 Chair stated their NPC submitted a letter at the January 12, 2010 ZBA meeting requesting this variance be denied. Said he understands the need of the property owner, but that their neighborhood is inundated with rental properties which have not been assets to the neighborhood and that the integrity of the neighborhood needs to be maintained. Noted Neighborhood Planning Council #4 is in full disagreement with approving this variance.

Mr. David Smolinski, 47 Orchard Pl, stated he lives in the neighborhood and agree that rental units are a problem for the neighborhood and he feels the petitioner has good intentions, but what will happen 20 years from now if it is approved. Stated he is not in support.

Ms. Becky Squires asked if this property had been inspected lately. Ms. Susan Bedsole stated yes, that is what brought it to the City's attention. Stated in 2007 it was inspected and approved for a one-unit. Ms. Bedsole further stated recent permits pulled were for roofing and a basement recreation room, and neither had anything to do with potential rental units.

Mr. Green said if it was inspected in 2007, why did the city make him bring the property up to code.

Mr. John Stetler asked if there were any others here to speak for or against this variance, seeing none he called this public hearing to a close.

MOTION: MR. CARLYLE SIMS MADE A MOTION TO APPROVE APPEAL #Z-02-10 FOR A USE VARIANCE TO ALLOW A TWO-UNIT IN AN "R-1B SINGLE FAMILY RESIDENTIAL DISTRICT" FOR PROPERTY LOCATED AT 68 E. EMMETT ST.; SUPPORTED BY MR. JAMES MORENO.

Discussion:

Mr. James Moreno for the January 12, 2010, ZBA meeting he had submitted his opinion stating he did not see a hardship and feels he cannot support this variance request.

Mr. Greg Dunn stated the issue is whether the property is a nonconforming use, as it was at some point of time and if it had been discontinued. Noted that the 2007 inspections showed it was approved at that time as a one-unit. Stated could be some dispute and if not the 2-unit could still be allowed and a variance would not be needed. Noted the issues seem to be economic and he is in agreement with the staff findings and is opposed to this request.

Ms. Jill Steele noted that what Mr. Karre referenced regarding Mr. Jenkins case; Mr. Jenkins never was a legal non-conforming use and that the question here is was the 2-unit use abandoned, which the ordinance states if not used as such for one-year it then loses its legal non-conformity. Stated the intent to abandon needs to be proven and in 2007 the intent was shown when the owner registered and had approved as a one-unit. Mr. Bieberich's case is that it had not sold for one-year and this showed there was no-intent to abandon and the other reason was a non-conforming set time needed to be established to prove it as being abandoned. Ms. Steele noted that monies can be spent on a home without being a multiple-unit for standard repairs and updates.

Mr. John Stetler asked what the zoning for this neighborhood was in 1947. Mr. Greg Dunn stated at the January 12th meeting he asked that question and was told it was single-family. Ms. Hilton stated in 1947 it was zoned "A" which allowed it to be single-family and/or two-family.

Mr. Perian stated it was abandoned for more than one-year, and the city has evidence to show the use as a two-unit has been abandoned, therefore this discontinues the two-family legal non-conforming use.

MR. JOHN STETLER ASKED FOR ANY ADDITIONAL COMMENTS, SEEING NONE A VOTE WAS TAKEN FOR THE VARIANCE; ONE IN FAVOR: STETLER; SIX OPPOSED: DAVIS, DUNN, FATT, MORENO, SIMS, AND SQUIRES: MOTION FAILED. ALL BOARD MEMBERS THAT VOTED IN OPPOSITION STATED THEY BASED THEIR DECISION ON THE FINDINGS NOTED PREVIOUSLY BY MR. PERIAN; RECORDS SHOWING INTENT TO ABANDON ITS LEGAL NON-CONFORMING USE; AND FEEL THERE IS NO UNNECESSARY HARDSHIP.

NEW BUSINESS:

Appeal #Z-04-10: (114 Fremont Street)

Mr. John Stetler stated for the record this was an petition of Mr. Kenneth D. Hardy, 6818 Marlow St., Portage, MI 49024, requesting a use variance to allow a 3-unit residential in a legal non-conforming 2-unit residential in an "R-1C Single Family Residential District" for property located at 114 Fremont Street, Parcel #5350-00-106-0. The rental permit application was denied because of Planning and Zoning Code, Chapter 1236.08 (e).

Mr. Glenn Perian read the staff report and findings regarding the variance request: Appeal #Z-04-10 is a petition from Ken Hardy seeking a use variance to allow a three-family dwelling in an R1C 'Single Family Residential' zone at 114 Fremont Street. Stated the subject lot is a residential lot approximately 42.5' wide by 130' deep with a land area of 5,610 sq. feet. The subject property meets the minimum lot area standard but not the minimum width standard of 50' for the R-1C zone. In 1924 the property was zoned "A-Single Family Residential District". In 1950 the property was zoned "C-Two Family Residential District" which allowed two residential housing units. The property is currently zoned "R-1C Single Family Residential" and used as a three-unit. A letter dated January 21, 2010 was sent by City Staff stating two residential units would be permitted as a legal nonconforming use, but not three. The property has never been zoned to allow for more than two-units and there are no records of when the building was converted from a two family dwelling to three family dwelling.

Mr. Perian noted staff is recommending denial of appeal #Z-04-10 based on the following findings:

- 1) Staff does not believe that the petitioner has clearly demonstrated that an unnecessary hardship does, in fact, exist.
- 2) Staff does not think the unnecessary hardship is exceptional and peculiar to the subject property. The property is located in the center of an R-1C zone and could be used for any use permitted in the R-1C district.
- 3) Staff does not believe the alleged hardship which will result in a failure to grant the variance is substantially more than a mere inconvenience in this case.
- 4) Staff does not think that by allowing the variance, substantial justice will result, considering the public benefits intended to be secured by the Zoning Code.

Mr. Perian stated based on these findings and those articulated in the staff report, staff is recommending denial of this appeal.

Mr. Stetler noted an error on page 2 in the staff report regarding the location of this property under "Surrounding Land Uses". Should read: *located on Fremont Street just north of Capital Avenue N.E.*

Mr. Ken Hardy, 68918 Marlow St., Portage, MI 49024, property owner came forward to speak; stated in the past he had paid rental registration for a 3-unit and that this year it was questioned and that in the past 5 years he has owned this property it had been a 3-unit. Said he has maintained this property and made every attempt to be in compliance with the city.

Ms. Becky Squires asked if within the past 5-years have the city been inside this property. Mr. Hardy stated only 2-years and that this year he applied for 3 units.

Mr. James Moreno asked how did he know it was for a 3-unit. Mr. Hardy said it had been checked for 3-units on the application for rental registration.

Mr. Greg Dunn asked Mr. Hardy if he had any permits to show for the construction of 3-units and can this property still be used as 2-units. Mr. Hardy stated it can be possible and would be a hardship and feels he has bought property and invested in Battle Creek and that this should be caught up front and not after it has been purchased.

Mr. Dunn stated he is not in the business of catching property owners, but it is the City commission decision to make the city ordinances that are initiated and are to be enforced. Mr. Hardy stated as a foot note he has paid 3-years as a 3-unit and that should be reason enough to allow.

Mr. Carlyle Sims asked Mr. Hardy if he had enough space for parking three cars. Mr. Hardy said yes.

Mr. Dave Smolinski, 47 Orchard Place, stated Mr. Hardy has valid points; but ordinance #1463 approved in 2007 has surfaced many issues, a lot with the number of units within properties. Said the problems with housing within the city and that this ordinance was designed to get to this type of problems.

Mr. David Nielsen, 44 Latta Street, NPC#4 Chairperson, stated their council had not met regarding this issue, but based on other issues within the neighborhood there has been an increase in rental properties within single family zones having more units beyond what they are zoned and that it puzzles him how they were allowed. Noted that 2 parking spaces are required per unit and this property does not have enough. Ms. Bedsole stated this property has grandfathered parking use that applies.

Mr. Hardy stated he respected their opinion and understands the ordinance Chapter #1463 was approved, but still notes he had paid 3-years for a 3-unit.

Mr. John Stetler asked if there were any others here to speak for or against this variance, seeing none he called this public hearing to a close and would entertain a motion.

MOTION: MR. JAMES MORENO MADE A MOTION TO APPROVE #Z-04-10 FOR A USE VARIANCE TO ALLOW A 3-UNIT RESIDENTIAL IN A LEGAL NON-CONFORMING 2-UNIT RESIDENTIAL IN AN "R-1C SINGLE FAMILY RESIDENTIAL DISTRICT" FOR PROPERTY LOCATED AT 114 FREMONT STREET; SUPPORTED BY MR. GREG DUNN.

Discussion:

Mr. John Stetler asked it be noted for the record regarding the correction in the staff report to reflect the correct address for this appeal as being 114 Fremont Street.

Ms. Becky Squires stated there was a change in the ordinance but not in the property ownership of which they have paid registration for 3 years; Ms. Squires asked if there was any exception for those property owners. Ms. Bedsole stated in the past the zoning was not a part of the rental registration process and in 2007 the ordinance was amended so that each rental registration application has a review of their zoning for compliance.

Ms. Jill Steele stated this variance request is similar to the variance for the Jenkins case, as it was never allowed to be constructed as a 3-unit and had never been caught. Said the owner is given the benefit of doubt to be allowed a 2-unit but never a 3-unit to be built.

Mr. Greg Dunn stated the new ordinance was setup to correct the zoning of properties and he will support that ordinance and staff.

MR. JOHN STETLER ASKED FOR ANY ADDITIONAL COMMENTS, SEEING NONE A VOTE WAS TAKEN FOR THE VARIANCE; NONE IN FAVOR; ALL OPPOSED: MOTION FAILED. ALL BOARD MEMBERS THAT VOTED IN OPPOSITION STATED THEY BASED THEIR DECISION ON THE FINDINGS NOTED PREVIOUSLY BY MR. PERIAN IN THE STAFF REPORT.

Appeal #Z-05-10: (94 Jericho Road)

Mr. John Stetler stated this was a petition of John & Tina Brownlee, 11055 6 ½ Mile Road, Battle Creek, MI 49014, requesting a use variance to allow 3-unit residential in a legal non-conforming 2-unit residential in an "R-1C Single Family Residential District" for property located at 94 Jericho Road, Parcel #6810-18-010-0. The rental permit application was denied because of Planning and Zoning Code, Chapter 1236.08 (e).

Mr. Perian read the staff report and findings: Appeal #Z-05-10 is a petition from John and Tina Brownlee seeking a use variance to allow a three-family dwelling in an "R-1C Single Family Residential" zone at 94 Jericho. Stated the subject lot is a residential lot approximately 51' wide by 132' deep and meets the minimum lot area and width standards for the R-1C zone. In 1924 the property was zoned "A-Single Family Residential District". The structure was built in 1928 as a single-family structure. In 1950 the property was zoned "C-Two Family Residential District" which allowed two residential housing units. The property is currently zoned "R-1C". A letter dated February 10, 2010 was sent by City Staff stating two residential units would be permitted as a legal nonconforming use, but not three. The property has never been zoned to allow for more than two-units and there are no records of when the building was converted from a two-family dwelling to three-family dwelling.

Mr. Perian noted staff is recommending denial of appeal #Z-05-10 based on the following findings:

- 1) Staff does not believe that the petitioner has clearly demonstrated that an unnecessary hardship does, in fact, exist.
- 2) Staff does not think the unnecessary hardship is exceptional and peculiar to the subject property. The property is located in an R-1C zone and could be used for any use permitted in the R-1C district.
- 3) Staff does not believe the alleged hardship which will result in a failure to grant the variance is substantially more than a mere inconvenience in this case.

- 4) Staff does not think that by allowing the variance, substantial justice will result, considering the public benefits intended to be secured by the Zoning Code.

Mr. Perian stated that based on these findings and those articulated in the staff report, they are recommending denial of this appeal.

Ms. Tina Brownlee came forward to speak stating they have owned this property for 20 years and was not sure when the zoning was changed to single-family. She said it was registered in 1995 & 1997 as a 3-unit and has three garbage pick-ups etc. Noted she had brought letter from the three renters who are elderly and will be homeless if they cannot stay and she does not want to kick them out.

Mr. Greg Dunn stated this does not have to do with the people, it is with the property. Ms. Brownlee asked if they ever make any exceptions. Mr. Dunn asked how they see it as being converted back. Ms. Brownlee stated it is an older home and if they start to tear down walls it will cause more difficulty.

Mr. Moreno stated the walls do not need to be torn down to make it become compliant. Ms. Brownlee stated she was not aware of not needing to tear down the walls. Ms. Jill Steele stated the walls do not necessarily need to be torn down; there are other options for compliance to remove a dwelling unit, including removing a kitchen, etc.

Mr. Greg Dunn asked if the SEV was correct. Ms. Brownlee stated yes.

Mr. Dave Smolinski, 47 Orchard Place, stated he feels for the property owner as the Post Addition is a neighborhood that is in more of a hardship, but as with the others he does not support the request.

Mr. John Stetler asked if there were any others here to speak for or against this variance, seeing none he called this public hearing to a close.

MOTION: MR. JAMES MORENO MADE A MOTION TO APPROVE #Z-05-10 FOR A USE VARIANCE TO ALLOW A 3-UNIT RESIDENTIAL IN A LEGAL NON-CONFORMING 2-UNIT RESIDENTIAL IN AN "R-1C SINGLE FAMILY RESIDENTIAL DISTRICT" FOR PROPERTY LOCATED AT 94 JERICHO ROAD; SUPPORTED BY MS. BECKY SQUIRES.

Discussion:

Mr. James Moreno stated he lives in the Post Addition and its density is higher than anywhere in the community, said it is important to be correct with the ordinance and feels the property can be used as a two-unit. Stated he will be voting against this request.

MR. JOHN STETLER ASKED FOR ANY ADDITIONAL COMMENTS, SEEING NONE A VOTE WAS TAKEN FOR THE VARIANCE; NONE IN FAVOR; ALL OPPOSED: MOTION FAILED. ALL BOARD MEMBERS THAT VOTED IN OPPOSITION STATED THEY BASED THEIR DECISION ON THE FINDINGS NOTED PREVIOUSLY BY MR. PERIAN IN THE STAFF REPORT AND STATED THERE IS NO HARDSHIP OR PRACTICAL DIFFICULTY.

Appeal #Z-06-10: (35 E. Columbia Avenue)

Mr. John Stetler stated for the record this was a petition of Mr. Matt Williams, Anchor Lakeview, LLC, 44 Grandville SW, Ste.1, Grand Rapids, MI 49503; requesting a variance for a (Long John Silvers) sign to exceed the maximum allowed sq. ft. of 100 sq. ft. and to allow 125 sq. ft. & to allow the sign to be off premises for property zoned "C-2 General Business District" for property located at 35 E. Columbia Ave., Parcels #0063-00-470-0; #0063-00-460-0; #7610-15-137-0; #7610-15-138-0; #7610-15-132-0 & #7610-15-141-0. The sign permit application was denied because of Planning and Zoning Code, Chapter 12.96.39 and 1296.37(2)(b).

Mr. Glenn Perian stated the variance request is a petition from Anchor Lakeview, LLC seeking approval of a sign variance to permit a 120 square foot free standing sign with 20 square feet of the proposed sign dedicated to off premises advertising as part of the new Family Fare project located on property generally located at the intersection of Capital Ave SW and E. Columbia Ave. Stated the subject lot is an irregularly shaped commercial property with road frontage on three sides. The property is zoned C-2 and free standing signs are permitted along each road frontage at a maximum size of 100 sq. ft. The applicant is requesting a variance to increase the size of a permitted sign fronting E. Columbia Avenue to 120 sq. ft. with the condition that no free standing sign will be constructed on Grand Blvd. Additionally, the request is to allow advertising for the proposed Long John Silvers restaurant that will front on Capital Ave., SW once the development is complete.

Mr. Perian noted based on the information contained in the application; planning staff is recommending approval of appeal #Z-06-10 based on the following findings with the condition that a free standing sign will not be installed on the property fronting Grand Blvd:

- 1) Staff believes the Applicant has demonstrated practical difficulty in this particular case by agreeing to eliminate a permitted sign along Grand Blvd. in order to reduce the commercial impact to the residences located on Grand Blvd. and to help encourage cross access for people accessing the Long John Silvers restaurant from E. Columbia Ave.
- 2) Staff does not think practical difficulty is self created in this case.
- 3) Staff believes the hardship or practical difficulties are exceptional and peculiar to the subject property. Because the property has three street frontages the applicant is agreeing to not install a sign along the Grand Blvd. frontage in an effort to help minimize the impact of the commercial development to the existing residential neighborhood.
- 4) Staff believes that allowing the variance will result in substantial justice being done considering the public benefits intended to be secured by the Code.

Mr. Perian stated that based on these findings and those articulated in the staff report, staff is recommending approval of this appeal with the condition that no additional free standing sign be installed fronting Grand Blvd..

Mr. Matt Williams, Anchor Lakeview LLC, was present to speak stated their application should have read that they were asking for 120 sq. ft. sign in stead of 125 sq. ft. sign. Said they would be a good neighbor and eliminate having a sign on Grand Blvd. and asking for a Long John Silvers sign on Columbia Ave. and would meet the requirements as stated in the Planning Department staff report.

Mr. Deland Davis asked if this variance is denied would they put a sign on Grand Blvd. Mr. Williams stated he cannot say as there are five other persons that need to make that decision.

Mr. John Reed, 737 Capital Avenue came forward to speak and asked if there would be a sign on Columbia Avenue and Long John Silvers sign on Capital Avenue. Mr. Williams stated yes, there will be 100 sq. ft. sign on Capital Avenue and would be the same as the other signs on Capital Avenue.

Mr. Reed asked if they got a variance for the setback of the Capital Avenue Sign. Mr. Perian stated no, as it is allowed by the ordinance and does not require a variance.

Mr. Carlyle Sims asked Mr. Reed if the sign setback was the same as their business sign would they be in agreement. Mr. Reed stated, yes he wants it to be the same.

Mr. Carlyle Sims asked Mr. Williams if they would object if the same setback were required as the other properties along Capital Avenue. Mr. Williams stated yes, he would object as Capital Avenue sign has nothing to do with their request for sign on Columbia Avenue.

Mr. John Stetler stated Capital Avenue is not the issue of their variance request.

Mr. Reed asked if the sign on Capital is in compliance. Mr. Perian stated yes, they are asking to be 10 ft. setback on Capital Avenue which has nothing to do with this variance request for sign on Columbia Avenue.

Ms. Jill Steele stated it is important that when the motion is made, it is noted they all agree not to have a sign on Grand Blvd.

Mr. John Stetler asked if there were any others here to speak for or against this variance, seeing none he called this public hearing to a close and would entertain a motion.

MOTION: MR. CARLYLE SIMS MADE A MOTION TO APPROVE #Z-06-10 TO ALLOW 120 SQ. FT. SIGN TO BE OFF PREMISES IN A "C-2 GENERAL BUSINESS DISTRICT" AS SUBMITTED WITH STIPULATION THAT THE SIGN NOT EXCEED OTHER SIGNS SETBACK ALONG THE STREET; FOR PROPERTY LOCATED AT 35 E. COLUMBIA AVENUE; SUPPORTED BY MR. JAMES MORENO.

WITHDREW MOTION: (SUPPORT WITHDRAWN)

MOTION: MR. MIKE FATT MADE A MOTION TO APPROVE #Z-06-10 TO ALLOW 120 SQ. FT. SIGN FOR LONG JOHN SILVER TO BE OFF PREMISES IN A "C-2 GENERAL BUSINESS DISTRICT" AS SUBMITTED WITH STAFF FINDINGS WHICH INCLUDES THAT NO SIGN BE PLACE ON GRAND BLVD.; FOR PROPERTY LOCATED AT 35 E. COLUMBIA AVENUE; SUPPORTED BY MS. BECKY SQUIRES.

Discussion:

Mr. Greg Dunn stated he would need to abstain from vote due to business connections.

Mr. Deland Davis asked if this sign needed to be larger than the others and why not have 100 sq. ft. and then have a smaller sign for the other property. States he does not feel it will take traffic from the street as it is already busy and does not see this as being unique.

MR. JOHN STETLER ASKED FOR ANY ADDITIONAL COMMENTS, BEING NONE A VOTE WAS TAKEN FOR THE VARIANCE; (4) IN FAVOR: FATT, SIMS, SQUIRES, AND STETLER; (2) OPPOSED: DAVIS AND MORENO; ONE ABSTAINED: DUNN MOTION APPROVED. MR. FATT, MR. SIMS, MS. SQUIRES AND MR. STETLER STATED THEY VOTED IN FAVOR; AS THEY ARE ALL IN AGREEMENT WITH THE FINDINGS NOTED IN THE STAFF REPORT. MR. DELAND DAVIS AND MR. JAMES MORENO STATED THEY VOTED NO, AS THEY DID NOT SEE ANY HARDSHIP OR PRACTICAL DIFFICULTY.

APPROVAL OF MINUTES:

MOTION: WAS MADE BY MR. CARLYLE SIMS TO APPROVE THE JANUARY 12, 2010 ZONING BOARD OF APPEALS MINUTES; SUPPORTED BY MR. MIKE FATT. ALL IN FAVOR, NONE OPPOSED, MOTION CARRIED - APPROVED.

COMMENTS BY THE PUBLIC: None

COMMENTS BY THE MEMBERS / STAFF:

Mr. Carlyle Sims stated that many years ago the Fort Custer homes were built and now are finding problems from when they were built 60 years ago.

Mr. James Moreno stated he lives in the Post Addition neighborhood and that 35 years ago was when they grew (rental heaven) and cut-up many of the properties at that time.

Mr. Greg Dunn said it is a challenge for many communities across the state and not just the Battle Creek area and will continue to be a challenge.

Mr. John Stetler asked about the Annual Staff Report handed-out. Ms. Christine Hilton stated this report is given as a summary for the year 2009; and also handed-out was the publication for the Zoning and Enabling Act that the board would need to review.

ADJOURNMENT: Mr. John Stetler moved for the meeting to be adjourned; all in favor, meeting was adjourned at 6:00 p.m.

Enclosed Attachments Handed-out:

Regarding - Appeal # Z -02-10 (68 E. Emmett Street):

- (Item #1) Document from Steffel & Steffel Attorneys & Consellers at Law (on behalf of petitioner).
- (Item #2) Document from Mr. Nelson Karre, Vandervoort, Christ & Fisher, P.C. (opposition)

Submitted by: Leona A. Parrish
Administrative Assistant, Planning Department

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KENT A. BIEBERICH

April 12, 2010

Charlene Hilton
City of Battle Creek Department of Planning and Zoning
77 East Michigan Ave., Suite 204
Battle Creek, MI 49017

Re: Variance Request Appeal #Z-02-10
Property located at 68 E. EMMETT ST., property ID# 3170-00-058-0.

Dear Ms. Hilton:

At the January 12, 2010 hearing, the City indicated that it had discovered a document issued in 1947 allowing the above property to be used as a two family residence. I requested that document on February 18, 2010, along with documents regarding a variance request for 167 Bryant. My office received a copy of the 1947 permit and the hearing documents on April 8, 2010. I was out of the office last week, but respond now.

Chapter 1288.01 of the Battle Creek Code of Ordinance states:

The lawful use of a building existing at the time of the adoption of this Zoning Code (Ordinance 36-84, passed December 18, 1984) may be continued, although such use does not conform with the Zoning Code. Such use may be extended throughout the portion of the building that was obviously designed therefor, provided that no structural alteration, except as may be required by law or ordinance, is made therein. If no structural alteration is made, a nonconforming use of a building may be changed to another nonconforming use of the same or a more restricted classification. This section shall apply to nonconforming uses in districts hereafter changed. Whenever a nonconforming use of a building has changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use.

Even though the use of 68 E. Emmett Street does not conform with the current zoning designation of the building, its nonconforming use should be allowed to continue for the following reasons:

1. The use of the building as a two family residence was lawful at the time the zoning ordinance was adopted.
2. The nonconforming use has not been abandoned. The burden of proving abandonment is on the City. *Livonia Hotel, LLC v. City of Livonia*, 359 Mich. App. 116, 673 NW2d 763 (2003). The City cannot meet this burden. The property was being used as a two-unit residence as recently as December 2009. The property was being used as two units when petitioner purchased it in September 2009. It is not being used as a two-family unit presently because of the city's denial of a rental permit, not because of the owner's abandonment of the nonconforming use. Moreover, a city cannot destroy

- by time limitation "nonconforming uses", whatever their nature. *Central Advertising Co., v. City of Ann Arbor*, 42 Mich. App. 59, 301 NW2d 365 (1972).
3. The thousands of dollars of improvements that petitioner has invested in the property have not enlarged, expended or structurally altered the property. All construction, which has been properly permitted by the city, has been to maintain the building. Ordinary maintenance is within the right of the owner of the property upon which there exists a nonconforming use and is not a prohibited expansion or enlargement of such use. *City of Madison Heights v. Manto*, 359 Mich. 244, 102 NW2d 182 (1960).
 4. The right to a nonconforming use extends to the purchaser of the property. See *Rudnik v. Mayers*, 27 Mich. App. 560, 183 NW2d 891 (1970) *aff'd* 387 Mich. 379, 196 NW2d 770 (1970).
 5. The nonconforming use is provided for by statute, MCL 125.3208. The granting of permission for continuation of a nonconforming use in a zoning ordinance or statute is to avoid the imposition of a hardship on the owner of the property. *Gerrish Township v. Esber*, 201 Mich. App. 532, 506 NW2d 588 (1993). The continuation of the nonconforming use in this case would prevent a significant hardship for the petitioner, and not impose any additional hardship as to the neighborhood. The building has been a two-story unit for over 60 years. Only one unit would be rented by petitioner, who lives in the other unit, and the building has been brought up to code.

If the City wishes to eliminate the nonconforming use, the Michigan legislature has provided a remedy. The City "may acquire, by purchase, condemnation, or otherwise, private property or an interest in private property for the removal of nonconforming uses and structures". MCL 125.3208(3). See *Central Advertising, supra*. (Nonconforming uses may be considered, but just compensation must be paid). While the petitioner is simply requesting the issuance of the permit to allow the rental of one unit of the two-family unit, the city has the legal option of compensating the petitioner for the net rent income lost from eliminating the nonconforming use.

I am providing you with ten copies of this letter for distribution to the board members, and city officials. Thank you for your consideration of this matter.

Yours very truly,



Kent A. Bieberich

KAB/gld
encl.
cc: Richard Green
Marion Pinkerton
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April 7, 2010

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Chris Hilton
 Planning Supervisor
 Department of Planning and Community Development
 Commerce Pointe Bldg.
 77 E. Michigan Ave.
 Battle Creek, MI 49017

Re: Zoning Variance, Appeal #Z-02-10; 68 E. Emmett St.

Ms. Hilton:

Please consider this letter an expression of continued opposition to the above variance request from Richard Green and Marion Pinkerton, set for further consideration by the ZBA on April 13, 2010. I represent Lanie Ganey, a neighbor at 58 E. Emmett. Ms. Ganey sent a letter dated January 5, 2010 objecting to the requested variance.

In addition to the reasons Ms. Ganey expressed in her letter, I urge the ZBA to deny the variance as the applicants have not demonstrated a practical difficulty or unnecessary hardship as required by the Ordinance. The applicants purchased the subject property when they knew or should have known of the restrictions against two family use. While the applicants may claim they did not in fact know, or even claim they were somehow misled by the seller or real estate agent, a simple check with your office would have informed them of the use limitations. That failure to check should be deemed a bar to any claimed hardship. They have not demonstrated they cannot use the property for any permitted use, and have not demonstrated any practical difficulty preventing such permitted use.

Further, two years ago when the ZBA considered the variance request of Steve Jenkins/Lakeview Rentals concerning property at 32 and 38 Battle Creek Ave, a request made on the basis of not knowing of the zoning limitation against more than two family use, the ZBA denied that variance essentially because it believed Mr. Jenkins could have learned of those limitations had he checked with your office. Mr. Jenkins was continuing a multi-family use that had gone on for decades, and assumed continued use was not a problem. The applicants in the

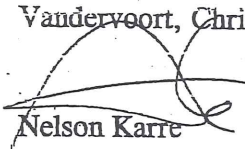
April 7, 2010

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above case cannot claim continuation of a prior use, even if it were persuasive. To be consistent, the ZBA should deny this variance just as it denied the request of Mr. Jenkins.

I ask that you share this with the ZBA. I know you will advise if you have questions or suggestions.

Vandervoort, Christ & Fisher, P.C.



Nelson Karre

rk/

c Lanie Ganey